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No. 82-1511

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982

STATE OF CALIFORNIA, et al.,
Cross-Petitioners

vs.

JAMES G. WATT, et al.,
Cross-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE STATE OF FLORIDA

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INTEREST OF AMICUS CURIAE

Amicus curiae, the State of Florida, to protect and preserve its interests as a Sovereign, and as parens patriae, on behalf of the citizens and residents of the State of Florida submits this brief in support of Cross-Petitioners, the State of California, et al.

The Coastal Zone Management Act of 1972 ("CZMA") was enacted by Congress to encourage the coastal states to develop and adopt comprehensive management programs for their coastal zones. Temporary funding to develop and administer the programs and a commitment on the part of the federal government to conduct its activities directly affecting the coastal zone in a manner consistent with the state programs were elements of the Act included by Congress to induce the states to seek federal approval of their Coastal Zone Management Plans. Florida's Coastal Zone Management Plan was

approved by the Department of Commerce on September 24, 1981. 46 Fed. Reg. 48742 (1981).

Florida has the longest coastline of any state in the continental United States. Its border is touched by the waters of the Gulf of Mexico and the Atlantic Ocean for 8,000-11,000 miles of its extent, depending on how many of its sinuosities and islands are included in the measurement. The predominantly low land elevation and high ground water level produce an interrelationship between the land and coastal waters which is more extensive than that of any other state. Brindell, The Proposed Florida Coastal Management Program, Environmental Regulation and Litigation in Florida 22.1, 22.8 (1981). From 1970 to 1980 population increases in coastal counties accounted for 72.4% of Florida's growth. Over that same time span the

number of tourists visiting Florida rose from 23.2 million to 35.9 million per year, a 54.7% increase.

The economic vitality of the state and its citizens is to a large extent dependent upon recreational and commercial activities conducted in coastal waters and adjacent land areas. Tourism is the leading industry in Florida and coastal areas are the State's major tourist attraction. In 1982, tourism produced 989 million dollars in sales tax revenue which constitutes 30% of total sales tax revenue. Sixty-seven percent of the State's general revenue is from sales tax. Florida's commercial and recreational fish industries are virtually dependent on coastal estuarine areas. A recent study found that five billion dollars are spent annually on activities associated with salt-water recreational fishing in Florida. Bell, Sorensen and

Leworthy, The Economic Impact and Valuation of Saltwater Recreational Fisheries in Florida, Sea Grant Report No. 47 (1982). Commercial fisheries are also of economic significance to the state. In sum, the State's economic vitality is largely dependent on the revenues and employment opportunities created by the commercial and recreational values of Florida's coastal areas.

The recently-proposed five-year leasing schedule indicates the Department of Interior intends to aggressively pursue OCS leasing. Only early consistency consultation will allow the State to adequately manage the coastal impacts and avoid delays in implementation of accelerated OCS leasing activities. As a state with federally approved Coastal Zone Management Plan, whose economy and environment are heavily dependent on its coastal

zone, Florida has a vital interest in the outcome of this litigation.

SUMMARY OF ARGUMENT

Activities of federal agencies which directly affect the coastal zone must be consistent with approved state coastal management programs to the maximum extent practicable. This Congressional mandate requires an initial determination of which activities conducted or supported by a federal agency "directly affect" the coastal zone.

The lower courts in this and other cases have determined that the decision to conduct a lease sale for rights to explore for and develop oil, gas and minerals in the Outer Continental Shelf ("OCS") is an activity which "directly affects" the coastal zone, and must therefore undergo consistency review pursuant to the Coastal Zone Management Act. These judicial determinations are in accord with the purpose of the Coastal Zone Management Act, the

operational scheme of the Act, and the direct expressions of Congressional intent that such pre-leasing decisions must comply with consistency requirements. Further, the National Oceanic and Atmospheric Administration, which is responsible for promulgating the implementing rules for the Act, reached a conclusion identical to that of the lower courts. Amicus Curiae urges this Court to affirm that the Coastal Zone Management Act requires that any decision to conduct a lease sale for Outer Continental Shelf lands must be consistent, to the maximum extent practicable, with approved state management programs.

The Ninth Circuit Court of Appeals also discussed the meaning of the phrase "to the maximum extent practicable, consistent with approved State Management Programs." It was unnecessary and inappropriate for the court to attempt a

discussion of that portion of the statute, since no consistency review had been conducted and no party had briefed the court on that issue. However, once it resolved to discuss the language, the Ninth Circuit provided erroneous guidance concerning the meaning of "to the maximum extent practicable, consistent with approved State Management Programs." Amicus submits the correct interpretation, and that which most closely reflects expressed Congressional intent, is found in 15 C.F.R. §930.32 (1983), the implementing regulation promulgated by the National Oceanic and Atmospheric Administration.

ARGUMENT I

THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE DEPARTMENT OF INTERIOR'S OUTER CONTINENTAL SHELF LEASE SALE DECISION DIRECTLY AFFECTS THE COASTAL ZONE WITHIN THE MEANING OF THE COASTAL ZONE MANAGEMENT ACT.

A. A Narrow Interpretation of "Directly Affecting" Will Thwart the Purposes of the Coastal Zone Management Act.

The question of which activities meet the "directly affecting" threshold test set forth in §307(c)(1) [16 U.S.C. §1456(c)(1976)] must be interpreted in light of the purposes of the CZMA. Philbrook v. Glodgett, 421 U.S. 707, 713 (1975)(quoting United States v. Heirs of Boisdore, 8 How. 113, 122 (1849)). The CZMA was enacted to incorporate state and national standards into a comprehensive scheme for the protection and beneficial use of the nation's valuable coastal resources. 16 U.S.C. §1451, 1452. A key element of this scheme is the voluntary adoption and implementation by each coastal state of a

management program which meets national coastal management standards and adequately considers the concerns of affected federal agencies. 16 U.S.C. §1452(i), 1455(c)(8), 1456(b). To encourage states to assume this substantial responsibility Congress offered the following opportunity: If a state, in consultation with affected federal agencies, adopts a coastal management program that meets national standards, then federal actions directly affecting the coastal zone will be conducted in a manner that is, to the maximum extent practicable, consistent with that program.

Implementation of the consistency requirement is essential to the success of the CZMA for two reasons. First, it encourages states to adopt and administer coastal management programs which meet national standards. Second, it influences

federal activities, many of which have profound effects on the coastal zone, to conform to national standards.

The comprehensive coastal management scheme established by the CZMA will be severely curtailed unless the Secretary's OCS leasing decisions are reviewed for consistency with federally approved coastal management programs. Final decisions as to the size and location of tracts to be developed, the timing of the sale, and the stipulations to which the leases are subject are made at the leasing stage. If the leasing decision itself is not reviewed for consistency there will not be another opportunity to evaluate the overall effects of leasing throughout an entire area. After the tracts are leased and a lessee seeks consistency certification for its individual exploration or development plan it is impossible for the state to evaluate

the cumulative effects of the lease sale. Consultation at the leasing stage allows the state and federal government to work together, before property rights to lessees attach, to reach a reasonable accommodation between the need to efficiently develop oil and gas resources and the need to assure maximum feasible protection for the na ion's coast.

Interpretation of the §307(c)(1) threshold test will effect the state's ability to deal with impacts of a variety of federal activities. Interior argues that an activity "directly affects" the coastal zone only when an immediate, physical coastal impact is directly threatened by the activity. Were the narrow reading urged by Interior adopted, federal activities with substantial coastal impacts could be excluded from consistency review, contrary to the intent of the

CZMA. Decisions regarding the design of federal projects which impact the coastal zone would not be evaluated for consistency until the final decision authorizing commencement of construction was made. For example, decisions concerning channel dredging, road and bridge construction, coastal construction projects such as ports and piers, dredge and fill operations or other activities actually occurring within the coastal zone would not be reviewed for consistency until the decision to begin operations was actually made, under Interior's theory. At that time federal agencies are likely to have spent extensive amounts of time and money in the design of a project which is not, to the maximum extent practicable, consistent with federally approved coastal management programs. Early consultation would allow federal agencies to incorporate design

features which reflect the national interest in the protection of coastal resources, and which accommodate the interests of the States.

In order to assure effective implementation of federally approved coastal management plans the CZMA requires federal/state consultation at the initial stages of federal activities which impact the coastal zone. 16 U.S.C. §1456a(c)(3); 1456b(a). The trial court found that states "are intended to be involved in every stage of the planning, from drawing board to execution" State of California v. Watt, 520 F.Supp. 1359, 1370 (C.D. Cal. 1981). The appellate court found that in order to effectuate the purposes of the CZMA "the state must be permitted to become involved at an early stage of a significant and comprehensive activity, such as Lease Sale 53, that will eventually have an appreci-

able impact on the coastal zone." State of Cal., Etc. v. Watt, 683 F.2d 1253, 1261 (9th Cir. 1982). Without such early consultation the state's ability to manage the coastal impacts of federal activities will be severely impaired and the incentive for states to implement a federally approved coastal management program will diminish. Further, the purposes of the CZMA to achieve state administration of a comprehensive management scheme which fosters coastal resource development without environmental damage would be utterly frustrated.

B. Congress Intended that "Directly Affecting" be Liberally Construed.

As indicated above, the purposes and policies of the CZMA would be frustrated were Interior's reading of §307(c)(1) adopted. Only a clear indication of congressional intent should override the

purposes and policy considerations of the Act. No such indication exists. In fact, Congress has addresed this issued, and has indicated that the "directly affecting" threshold test is to be liberally construed. Moreover, congress has specifically stated that the federal OCS lease decision is to be reviewed for consistency.

The CZMA was enacted in 1972 and amended in 1976 and 1978. Prior to enactment, while considering language applying consistency only to activities "in the coastal zone", the Senate stated:

> ...It is intended that any lands or water under federal jurisdiction and control, within or adjacent to the coastal estuarine zone, where the administering Federal agency determines them to have a functional interrelationship from an economic, social, or geographic standpoint with lands and waters within the coastal estuarine zone, should be administered consistent with approved State management program. S.Rep. No. 526, 92nd Cong., 1st Sess. 30 (Dec. 1971).

It is clear from this language that Congress intended federal activities in federal lands or waters outside the coastal zone to be reviewed for consistency if the "functional interrelationship" test was met. In 1972, the final Act substitued the phrase "directly affecting the coastal zone" for "in the coastal zone". The enacting conference committee did not discusss this apparent attempt to expand the scope of consistency review.

Legislative history demonstrates continous Congressional intent that OCS lease sale decions be reviewed for consistency. In discussing the consistency requirements for the OCS the 1975 Senate Report states:

> One of the specific federally related energy problem areas for the coastal zone is, of course, the potential effects of Federal activities on the Outer Continental Shelf beyond the State's coastal zones, including Federal authorizations for non-

> Federal activity, but under the act as it presently exists, as well as the S.586 amendments, if the activity may affect the State coastal zone and it has an approved management program, the consistency requirements do apply. S.Rep 277, 94th Cong., 1st Sess. 36-37 (1975); [emphasis supplied].

In 1976, in conjunction with other CZMA amendments the Senate Report found that:

> There is very little coordination or communication between Federal agencies and the affected coastal states prior to major energy resource development decisions, such as the decisions to lease large tracts of the OCS for oil and gas.
>
> ...Full implementation of the Coastal Zone Management Act of 1972...could go far to institute the broad objectives of Federal-State cooperative planning envisioned by the framers of the act. S.Rep. No. 277, 94th Cong., 2d Sess. 3 (1976); reprinted in 1876 U.S. Code Cong. & Ad. News 1770. [emphasis supplied]

The House, in describing Federal OCS leasing activity, stated:

> ...it is difficult to imagine that the original intent of the Act was not to include such a major federal action within the coverage of federal consistency. H. Rep. No. 878, 94th Cong., 2d Sess. 52-53 (1976).

The final House Report for the Outer Continental Shelf Lands Act Amendments expressly states that Interior's leasing decision is to be reviewed for consistency:

> The Committee is aware that under the Coastal Zone Management Act of 1972, as amended in 1976 (16 U.S.C. 1451 et seq.) certain OCS activities including lease sales and approval of development and production plans must comply with consistency requirements as to coastal zone management plans approved by the Secretary of Commerce. H. Rep. No. 590, 95th Cong., 1559 fn. 52 (1978); reprinted in U.S. Code Cong. & Ad. News at 1559 fn. 52; [emphasis supplied]

In 1980 Congress conducted a comprehensive examination of the CZMA and enacted the Coastal Zone Management Improvement Act of 1980. The House Report notes that "the primary purpose of H.R. 6979 is to reaffirm the nation's commitment to the wise use and management of our coastal resources through the coastal management program." H. Rep. No. 1012,

96th Cong., 2d Sess. 14 (1980). Because of its awareness of the dispute over the meaning of §307(c)(1), Congress specifically addressed the definition of the phrase "directly affecting" and made clear its intent that the Department of Interior's lease sale decision must be reviewed for consistency.

Congress stated expressly that the federal lease sale decision meets the "directly affecting" threshold. The Senate Report, after reviewing the legislative history of the 1976 amendments to the CZMA, reaffirmed that "The Department of Interior's activities which preceded lease sales were to remain subject to the consistency requirements of Section 307(c)(1)" and that federal-state "coordination must continue during the critical exploration, development, and production stages." S. Rep. No. 783, 96th

Cong., 2d Sess. 11 (1980); [emphasis supplied]. The House Report similarly states that the 1976 amendments to §307(c)(1) "did not alter Federal agency responsibility to provide states with a consistency determination related to OCS decions which preceded issuance of leases." H. Rep. No. 1012, 96th Cong., 2d Sess. 28 (1980); [emphasis supplied]. Such unequivocal expressions of legislative intent are rare, and in this case they are highly persuasive of the ambit of the "directly affecting" language in the CZMA.

In addition Congress specifically addressed the phrase "directly affecting" and offered two interpretations. Both the House and Senate Reports point out the importance of timely consistency review and emphasize that consultation between federal and state agencies should occur at the "earliest practicable time". H. Rep. No.

1012, 96th Cong., 2d Sess. 34 (1980); S.Rep. No. 783, 96th Cong., 2d Sess. 11 (1980); reprinted in U.S. Code Cong. & Ad. News 4382-83. The House Report indicates support of "an expansive interpretation of the threshold test" and notes that the "directly affecting" threshold test was:

> considered during earlier congressional deliberations and was determined to apply whenever a Federal activity had a functional interrelationship from an economic, geographic or social standpoint with a State coastal program's land or water use policies . . . Thus, when a Federal agency initates a series of events of coastal management consequence, the intergovernmental coordination provisions of the Federal consistency requirements should apply. H. Rep. No. 1012, 96th Cong., 2d Sess. 34-35 (1980); reprinted in U.S. Code Cong. & Ad. News 4382-83.

The House language was quoted favorably in the Senate Report: "Intergovernmental coordination for the purposes of OCS development commences at the earliest practicable time in the opinion of the

Committee, as the Department of Interior sets in motion a series of events which have consequences in the coastal zone.[1] S. Rep. No. 783, 96th Cong., 2d Sess. 11 (1980).

The Ninth Circuit stated "[I]n the circumstances of this case we accord (the 1980 Committee Reports) substantial weight because they appear to us to serve better the purposes of the CZMA than would the narrower interpretation urged by the federal appellants." State of Cal., Etc. v. Watt, 683 F.2d at 1262. The Court concluded the leasing decision does "directly affect" the coastal zone, and therefore must be reviewed for consistency.

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[1]As noted earlier this report also stated expressly that Interior's leasing decisions met the §307(c)(1) threshold test.

C. NOAA's Longstanding Interpretation of Section 307(c)(1) is Entitled to Deference.

In determining the meaning of §307(c)(2) the interpretation of NOAA, the agency charged with promulgating rules for the CZMA is entitled to deference. Train v. NRDC, 421 U.S. 60, 87, 95 (1975); Udall v. Tallman, 380 U.S. 1 (1965). NOAA's expertise in national coastal matters also suggests that deference should be accorded. See, Ethyl Corp. v. Environmental Protection Agency, 541 F.2d 1 (D.C. 1976).

Until May, 1981, NOAA consistently took the position that Interior's leasing decision is subject to consistency reviews. 43 Fed. Reg. 10510 (1978); 44 Fed. Reg. 37142 (1979); State of California v. Watt, 520 F.Supp. 1359, 1376 (C.D. Cal. 1981); State of Cal. Etc. v. Watt, 683 F.2d 1253, 1262 (9th Cir. 1982). NOAA's final

regulations in 1978 and their 1979 amendments favor liberal construction of the §307(c)(1) threshold test so as to favor inclusion of fedreal activities subject to consistency review. 43 Fed. Reg. 10510, 10519 (1978); 44 Fed. Reg. 37142, 37146-47 (1979). NOAA explained that "implementation of this requirement at the OCS prelease stage should lead to minimization of adverse coastal environmental and socioeconomic impacts thereby reducing conflicts with affected states and avoiding delay in the exploitation of offshore energy resources." 44 Fed. Reg. 37142, at 37142 (1979).

Shortly after commencement of the present case, in an abrupt departure from its previous interpretations, NOAA filed a notice of proposed rulemaking defining "directly affecting" "in a way more nearly consistent with, if not identical to" that

urged by Interior. State of Cal., Etc. v. Watt, 683 F.2d at 1262; 46 Fed. Reg. 22658, 22659-60 (1981). In the comments to this notice, NOAA lists Interior's lease decision as an activity which does not directly affect the coastal zone. On July 2, 1981, NOAA issued its notice of final rulemaking. In late July and early August resolutions were introduced in both houses of Congress disapproving NOAA's new regulations. Following the district court decision in this case and a vote by the House Merchant Marine and Fisheries Committee to disapprove the new regulations, NOAA published notice that suspended the effective date of the regulation and recommended their recission. 46 Fed. Reg. 50937, 50976 (1981).

The trial court and the appellate court concluded that NOAA's longstanding liberal construction of the consistency

requirement is entitled to deference and that the agency's short-lived, narrow definition of "directly affecting" is not persuasive. State of California v. Watt, 520 F.Supp. at 1378; State of Cal., Etc. v. Watt, 683 F.2d at 1263. As noted by the Ninth Circuit, "To defer to such a passing phase in the appropriate agency's interpretation would amount to obeisance to shadows and a flight from judicial responsibility." State of Cal., Etc. v. Watt, 683 F.2d at 1263.

D. All Applicable Precedent Supports the Holding that Lease Sale 53 Directly Affects the Coastal Zone.

All courts having considered the issue flatly rejected the reading of "directly affecting" urged by Interior and determined the federal leasing decision must be reviewed for consistency. The lower courts in the present case found that a federal

activity directly affects the coastal zone if it either "sets in motion a chain of events which has consequences in the coastal zone" or if it has a "functional interrelationship from an economic, geographic, or social standpoint with lands and waters in the coastal zone." State of California v. Watt, 520 F.Supp. at 1359; State of Cal., Etc. v. Watt, 683 F.2d at 1253. Applying these definitions both courts found that OCS Lease Sale 53 "directly affects" California's coastal zone and required the Department of Interior to provide a consistency determination. Id.

Following these decisions by the district court and the Ninth Circuit, a Third Circuit district court also rejected the reading of "directly affecting" urged by Interior, and ordered the Department of Interior to provide a consistency deter-

mination for certain tracts of an OCS lease sale off the New Jersey coast. Kean v. Watt, No. 82-2420 (D.N.J., filed Sept. 7, 1982), appeal docketed, No. 82-5679 (3d Cir., Dec. 30, 1983).[2]

A First Circuit district court likewise rejected Interior's argument, holding that the entire lease sale at issue "directly affects the Massachusetts Coastal Zone and therefore is subject to the

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[2]The court's statement that OCS activities which cause adverse economic impact but do not affect the natural environment of New Jersey's coastal zone do not meet the section 307(c)(1) threshold test is under appeal to the Third Circuit and has been expressly rejected by a First Circuit district court: Massachusetts v. Watt, No. 83-0530 (D. Mass., filed March 28, 1983). This statement does not alter the New Jersey district court holding that where impacts on the natural environment of the coastal zone are shown, the Department of Interior must provide a consistency determination at the lease sale stage, contrary to Interior's arguments that consistency certification is only to be provided by individual lessees' later certification.

consistency requirements of the Coastal Zone Management Act." Massachusetts v. Watt, No. 83-0530 (D. Mass., filed March 28, 1983).

Amicus urges this Court to affirm the decision and the reasoning of the Ninth Circuit with respect to whether the decision to conduct a lease sale for oil and gas exploration on the outer continental shelf "directly affects" the coastal zone in accordance with the CZMA. The nature of the CZMA and the legislative history of the "directly affecting" language evidence a specific congressional intent that pre-leasing activities by the Department of Interior are to be reviewed for consistency. Indeed, requiring a consistency review at the pre-leasing stage not only insures compliance with expressed Congressional intent it also presents the only opportunity for overall review of an

entire program, thus helping to preserve the integrity of the coastal zone and to prevent wasteful expenditure of public funds on activities which might later be found inconsistent.

ARGUMENT II

THE CIRCUIT COURT OF APPEALS ERRED BY ADDRESSING THE EXTENT TO WHICH THE CZMA REQUIRES FEDERAL ACTIVITIES TO BE CONSISTENT WITH STATE MANAGEMENT PLANS OUTSIDE THE CONTEXT OF AN ACTUAL DISPUTE.

This issue and the issue which follows concern the application of the second half of Section 307(c)(1) of the CZMA, 16 U.S.C. §1456(c)(1)(1976), to the lease sale stages of Outer Continental Shelf oil, gas and mineral development. Section 307(c)(1) reads:

> Each federal agency conducting or supporting activities directly affecting the coastal zone shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved state management programs.

The Court of Appeals, in response to language in the District Court opinion indicating that the Department of Interior had to conduct all its lease sale activities on the tracts at issue in a manner consistent with California's Coastal

Zone Management Plan, felt compelled to address the meaning of the phrase "to the maximum extent practicable, consistent with approved state management programs." State of Cal., Etc. v. Watt, 683 F.2d 1253, 1264-65 (9th Cir. 1982). This disquisition on the meaning of the second half of Section 307(c)(1) was unnecessary and improper because a consistency determination was not done in this case. By merely adding the limiting language from Section 307(c)(1) to the lower court's Order for relief, the Circuit Court of Appeals would have accomplished all that was necessary or appropriate.

Pursuant to congressional mandate, the National Oceanic and Atmospheric Administration developed an elaborate regulatory scheme to administer and enforce the consistency requirements of Section 307(c)(1). 16 U.S.C. §1463 (1976); 15

C.F.R. §930.30-.44 (1983). This regulatory system was designed to focus the factual and legal issues which arise in a consistency dispute, establish an accurate record and enhance the likelihood of the resolution of conflicts without resort to litigation.

The Court has shown great reluctance to address issues arising from speculation about the administration and enforcement of state and federal legislation and administrative regulations where an adequate factual record is necessary for a proper decision or a prudent application of the rules or statues might result in no litigation. Pacific Gas & Elec. v. Energy Res. Comm'n, ___ U.S. ___, ____, 75 L.Ed.2d 752, 763-64 (1983); Abbott Laboratories v. Gardner, 387 U.S. 136, 148-49 (1976). In addition, there is nothing in the record of this case to indicate that the withholding

of court consideration at this time will cause a hardship to the parties. Id. at 149. Whether the Department of Interior's lease sale activities are consistent to the maximum extent practicable with California's Coastal Zone Management program is an issue which will be ripe for decision, if ever, after the parties have complied with NOAA's regulations.

ARGUMENT III

THE CIRCUIT COURT OF APPEALS ERRED IN ITS CONSTRUCTION OF THE PHRASE "TO THE MAXIMUM EXTENT PRACTICABLE, CONSISTENT WITH APPROVED STATE MANAGEMENT PROGRAMS".

The legislative history and subsequent administrative interpretation of Section 307(c)(1) conflict with the Court of Appeals' construction of the phrase "to the maximum extent practicable, consistent with approved State Management Programs."

An established principle of statutory construction requires that in interpreting a statute the court turn first to the language in which the act is framed. If it is plain and subject to only one meaning, the statute should be enforced according to its terms. Caminetti v. United States, 242 U.S. 470, 485 (1917). From the bare words of this statute it is not possible to tell precisely to what extent Congress intended state management programs to influence the

activities of federal agencies which directly affect state coastal zones. Section 307(c)(1) does not provide any standards or guidelines to aid in its interpretation.

Apparently, without referring to the legislative history of the Act and other sources of statutory construction, the Circuit Court of Appeals attempted to provide some guidance to the Department of Interior as to what degree its lease sale activities would have to conform to California's Coastal Zone Management Program. Some of the comments of the Court conflict with the intent of the legislators who passed the Act:

> The statute does not provide that a state's plan takes precedence when it would preclude the federal activity, or even that the Federal activity must be as consistent with the plan as is possible. It only provides that the activities be consistent to the maximum extent practicable . . . . The limit

> beyond which conformity with the state plan would not be practicable to the maximum extent cannot be precisely delineated. Such factors as the extent to which leasing, exploration, development, drilling and production would be hampered or proscribed by conformity; the reasonableness of the state plan; as well as the terms of the particular proposed lease sale must be examined. State of Cal., Etc. v. Watt, 683 F.2d 1253, 1264-65 (9th Cir. 1982)

The discussion of the appellate court could be interpreted to imply that Section 307(c)(1) of the CZMA does not impose major substantive requirements on federal agencies contemplating activities directly affecting state coastal zones. The Court of Appeals suggested that in determining if consistency is practicable, it is appropriate for federal agencies to consider the reasonableness of the state plans even after they have been approved.

When construing statutes, it is the duty of the courts to give effect to the intent of Congress. Philbrook v. Glodgett,

421 U.S. 707, 713-14 (1975); Ozawa v. United States, 260 U.S. 178, 194 (1922). Is is appropriate to refer to the legislative history of a statute however clear its words may appear on superficial examination. United States v. American Trucking Association, 310 U.S. 534, 543-44 (1940); Train v. Colorado Pub. Int. Research Group, 426 U.S. 1, 10 (1976); Hunt v. Nuclear Regulatory Commission, 611 F.2d 332, 336 (10th Cir. 1979), cert. denied, 445 U.S. 906 (1980). Section 307(c)(1) of the CZMA originated in the House of Representatives. H. Rep. No. 1049, 92d Cong., 2d Sess. 5 (1972). In its report to the Whole House, the Committee on Merchant Marine and Fisheries discussed how Section 307(c)(1) was to relate to the rest of Section 307:

> Subsection (c) provides that once a state management program has been approved pursuant to the procedures set forth in the bill, it is expected that each federal agency in

conducting and supporting activities in the coastal zone will see that those activities are consistent with the program. Under the procedures established, the Secretary is required to consult with all cognizant federal agencies prior to approval of a program. It is anticipated that during this process any aspects or phases of the proposed program which are deemed by any agency to be impractical to carry out or support will be brought to the attention of the Secretary and steps will be taken at that point to iron out whatever difficulties appear to be established. There may, however, arise, after the approval of the program, some circumstances not foreseen at the time of its approval which may present a federal agency with an obstacle or situation which as a practical matter may prevent complete adherence to the approved program. For that reason, the Committee felt that some leeway should be written into the statute with respect to activities of federal agencies in connection with approved programs.

It is not anticipated that there will be any considerable number of situations where as a practical matter a federal agency cannot conduct or support activities without deviating from approved state management programs. H. Rep. No. 1049, 92d Cong. 2d Sess. 20 (1972).

It is apparent from the legislative history of Section 307(c) that Congress intended that federal agencies would conduct their activities consistent with State Coastal Zone Management Programs. During the approval process, all relevant federal agencies were to be given the opportunity to comment on the proposed state plan. H. Rep. No. 1049, 92d Cong. 2d Sess. 4, 5 (1972); 16 U.S.C. §1455(c)(1), 1456(b)(1976). Difficulties caused by the reasonableness of the plan were to be resolved prior to approval. However, Congress did intend the CZMA to be flexible enough to accommodate federal agencies whose activities due to unforeseen circumstances were in conflict with approved State Management Plans. These activities would not have to be conducted in a manner fully consistent with State Management Programs. This is what was intended by the

phrase "to the maximum extent practicable, consistent with approved State Management Programs."

The language chosen by the Circuit Court of Appeals goes beyond the limited exception intended by Congress. There is nothing in the legislative history of the CZMA which suggests that it is appropriate for federal agencies to review the reasonableness of state plans subsequent to approval. The statutory language was merely intended to provide an exception in the event of circumstances not foreseen at the time of approval. The Committee report also indicated that these exceptions should be relatively rare. H. Rep. No. 1049, 92d Cong., 2d Sess. 20 (1972).

The Senate adopted the House version of the Coastal Zone Management Act of 1972. H. Rep. No. 1544, 92d Cong., 2d Sess. 1-11 (1972). Section 307(c)(1)

remained unchanged. H. Rep. No. 1544, 92d Cong., 2d Sess. 7 (1972). The conference report resulting from the two Houses of Congress indicated that "federal agencies must make certain that their activities are to the maximum extent practicable consistent with approved State Management Programs." H. Rep. No. 1544, 92d Cong., 2d Sess. 14 (1972).

The construction given statutory provisions by an administrative agency delegated the responsibility of promulgating rules and regulations to enforce or administer the legislation is normally entitled to deference from the courts. Train v. NRDC, 421 U.S. 60, 87 (1975); Udall v. Tallman, 380 U.S. 1, 16 (1965); Power Reactor Develop. Co. v. Electrical Union, 367 U.S. 396, 408 (1961); See also American Petroleum Institute v. Knecht, 456 F.Supp. 889, 908 (C.D. Cal. 1978), aff'd,

609 F.2d 1306 (9th Cir. 1979). The National Oceanic and Atmospheric Administration was the agency within the Department of Commerce delegated the responsibility of developing the regulations for the CZMA. NOAA promulgated the following regulations implementing Section 307(c)(1):

> (a) The term 'consistent to the maximum extent practicable' describes the requirement for federal activities including development projects directly affecting the coastal zone of States with approved management programs to be fully consistent with such programs unless compliance is prohibited based upon requirements of existing law applicable to the Federal agency's operations. If a Federal agency asserts that compliance with the management program is prohibited, it must clearly describe to the State agency the statutory provisions, legislative history, or other legal authority which limits the Federal agency's discretion to comply with the provisions of the management program. The duty, the Act imposes upon Federal agencies is not set aside by virtue of Section 307(e). The Act was intended to cause substantive changes in Federal agency

> decisionmaking within the context of the discretionary powers residing within such agencies. Accordingly, when read together, sections 307(c)(1) and (2) and 307(e) require Federal agencies, whenever legally permissible, to consider State-management programs as supplemental requirements to be adhered to in addition to existing agency mandates.
>
> (b) A Federal agency may deviate from full consistency with an approved management program when such deviation is justified because of some unforeseen circumstances arising after the approval of the management program which present the Federal agency with a substantial obstacle that prevents complete adherence to the approved program. 15 C.F.R. §930.32 (1983).

When Sections (a) and (b) of the regulation are considered together, they approximate the intent of the legislators who drafted and enacted Section 307(c)(1). It is important to note that NOAA has never formally proposed to withdraw this particular regulation.

In conclusion, the State of Florida would respectfully suggest that if the

Court declines to strike the discussion in the lower court opinion addressing the meaning of "consistent to the maximum extent practicable" for the reasons stated in the previous section of this brief, the Court adopt NOAA's construction of Section 307(c)(1). 15 C.F.R. §930.32 (1983).

CONCLUSION

Amicus Curiae joins the Cross-Petitioners, State of California, et al., in urging the Court to affirm the decision of the Court of Appeals with respect to its conclusion that leasing activities on Outer Continental Shelf lands by the Department of Interior "directly affect" the coastal zone and therefore must, to the maximum extent practicable, be consistent with approved state coastal programs. Amicus Curiae urges the Court to strike the dicta of the Court of Appeals with respect to the meaning of the phrase "consistent to the maximum extent practicable," or, in the alternative, to substitute the meaning given that phrase by the National Oceanic and Atmospheric Administration.

Respectfully submitted,

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